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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOHN VANDERLINDE, Defendant and Appellant.	B156906 (Los Angeles County Super. Ct. No. KA053758)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mark G. Nelson, Judge. Affirmed.

John A. Colucci, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Marc E. Turchin and David A. Wildman, Deputy Attorneys General, for Plaintiff and Respondent.

John Vanderlinde appeals from the judgment entered upon his conviction by jury of attempting to evade a peace officer while driving recklessly (Veh. Code, § 2800.2, subd. (a))[1] (count 1) and misdemeanor resisting a peace officer (Pen. Code, § 148, subd. (a)(1)) (count 2). The trial court sentenced appellant to the midterm of two years on count 1 and to one year on count 2, to be served concurrently. Appellant contends that (1) the evidence was insufficient to support the conviction for attempting to evade a peace officer, (2) section 2800.2 creates an unconstitutional mandatory presumption of "willful and wanton disregard for safety" when three Vehicle Code violations occur in the course of a police pursuit, and the trial court erred in so instructing the jury, (3) the trial court erred in failing to instruct the jury sua sponte on mistake of fact, in accordance with CALJIC No. 4.35, and (4) Penal Code section 654 bars multiple punishment for evading a peace officer and resisting a peace officer.

We affirm.

FACTS

We review the evidence in accordance with the usual rules on appeal. (*People v. Autry* (1995) 37 Cal.App.4th 351, 358.) On August 16, 2001, at approximately 11:30 p.m., City of Covina police officer, Isobel Crump, in uniform and driving a marked black and white police vehicle, observed a pick-up truck with its headlights off, driven by appellant, heading east on San Bernardino Road, in the City of Covina, in the County of Los Angeles. When Officer Crump attempted to stop appellant on Vincent Avenue by activating the red light on the top of her vehicle, he promptly pulled to the side of the road. Officer Crump stopped her vehicle behind appellant's truck and turned on her hand operated spotlight which she shined into appellant's side view mirror.

As Officer Crump stepped out of her vehicle, appellant drove away, beginning a "low-speed chase," lasting approximately 40 minutes through primarily residential streets in the Cities of Covina and Azusa. Four additional police vehicles joined the pursuit

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[1] All further statutory references are to the Vehicle Code unless otherwise indicated.

along the way. Traffic was light, and at no time did appellant come close to hitting any other vehicle. Officer Crump testified that appellant did not turn on his headlights or exceed 35 miles per hour at any time during the pursuit.[2] When Officer Crump became convinced that appellant was not going to stop, she gave three short blasts on the siren and activated the wailing siren and rotating lights.

Going north on Lark Ellen, appellant moved into the left turn lane, controlled by a left turn arrow, to turn on Arrow Highway. Officer Crump testified that appellant violated the Vehicle Code by failing to signal the left turn. Appellant stopped at the limit line of the crosswalk for the red arrow. Instead of turning, he went through the red arrow and continued northbound on Lark Ellen. Officer Crump testified that appellant thereby violated section 22100, subdivision (b), prohibiting proceeding straight from a left turn lane.

At the corner of Vernon Avenue and Gladstone, in the City of Azusa, appellant, traveling at 30 to 35 miles per hour, went through a light that had been red for several seconds before he entered the intersection, violating section 21453, subdivision (a).

While circling residential streets in Azusa, appellant failed to stop on two different occasions at a stop sign at Vernon Avenue and Paramount, "roll[ing]" through at five to 10 miles per hour, violating section 22450, subdivision (a).

Appellant left Azusa, proceeding south on Lark Ellen towards Covina. At Arrow Highway, he stopped for a red light behind another vehicle. He waited for several cycles of the light as the vehicle in front of him did not move because of the police activity. When the vehicle in front of appellant began moving, appellant and the police vehicles resumed moving south on Lark Ellen.

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[2] Officer Richard Walczak, who joined the pursuit, testified that appellant's headlights were on and off at different times during the pursuit. He also testified that appellant was generally driving at or below the speed limit, at approximately 35 to 40 miles per hour, but that at some points during the pursuit, appellant was driving at 30 to 35 miles per hour in a 25 mile per hour residential zone.

At Azusa Avenue and Puente, appellant turned into a Denny's restaurant parking lot, circled, and stopped, remaining in the driving position with his hands on the wheel. Officer Crump drew her gun. Officer Walczak ordered appellant to turn off his engine and place his hands outside of the window. A helicopter shined a light on the truck to see if appellant had a weapon or if there was anyone else inside the vehicle and repeated the same orders. At first, appellant did nothing, but after five minutes, he turned off the engine. Instead of putting his hands up, he rolled up the truck windows and lay down on the front seat for five to 10 minutes. Because appellant was not responding to orders, an officer shot out the passenger side window with a beanbag gun to distract him. When the window broke, appellant sat up and looked around, and four officers approached the driver's side door, forcibly removing him from the vehicle. Appellant did not resist or fight with the officers, although he did not cooperate. He was arrested and jailed.

Officer Walczak and his trainee, Officer Harris, transported appellant to the police station. En route, appellant appeared confused, stating that his truck was being asphyxiated. At the jail, he talked about trying to get to Charter Hospital and not stopping for the police. When Officer Crump arrived at the station, Officer Walczak told her he thought appellant had mental problems. When she spoke to appellant, he stared straight ahead emotionless and unresponsive and appeared unable to care for himself. His mother and a psychiatrist told Officer Crump that appellant had not been taking his medication. He was transported to a local hospital and placed on a 72-hour hold. Appellant had been on a similar hold only a week or so earlier.

The defense did not dispute any facts pertaining to the pursuit. Instead, appellant's defense was based exclusively on evidence of his mental disorder. Appellant's mother testified that appellant was 33 years old, suffered from mental illness since he was 19 and had been in 20 different mental hospitals. He was taking the drug Risperdal which eliminated all symptoms of his mental illness when regularly taken. Without the medication, he became reclusive and hallucinated. He had a history of repeatedly discontinuing his medication and told his mother he had again done so at the time of the pursuit. Appellant's brother testified that he urged appellant to stop his

medication because it was unnecessary if he would read the Bible more, pray and have faith in God.

Defendant called Dr. Richard Edelman, a psychiatrist. Dr. Edelman interviewed appellant and reviewed the preliminary hearing transcript, police report and appellant's medical records. He testified that appellant suffered from a "schizophrenic disorder, paranoid-type," a severe mental disorder characterized by aural and visual hallucinations, delusions, paranoia and inability to distinguish reality from hallucination. He was "schizo affective," evidencing a combination of panic and depression with delusional thought processes. Dr. Edelman also testified that medication is effective in treating hallucinations in schizophrenics, although symptoms reappear if the medication is stopped, and schizophrenics commonly refuse to take their medication, believing they do not need it.

Dr. Edelman testified that when interviewed, appellant exhibited no symptoms of his mental illness and acted appropriately. Dr. Edelman learned from reviewing appellant's history that he was taking Risperdal daily to control his hallucinations and paranoid thoughts. He concluded that appellant was psychotic at the time of the pursuit because appellant stated he was afraid of the police, believed they were going to shoot him and said he was being asphyxiated from poisonous fumes. When the officers pulled appellant from his truck, he experienced a visual hallucination of a growling dog ready to bite him. Dr. Edelman opined that appellant knew he was being pursued during the incident but lacked the ability to interpret why.

DISCUSSION

I. There was sufficient evidence to support appellant's conviction for attempting to evade a peace officer.

Appellant was charged in count 1 with attempting to evade a peace officer while driving recklessly, in violation of section 2800.2, subdivision (a).[3] That offense must be

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[3] Section 2800.2 provides: "(a) If a person flees or attempts to elude a pursuing peace officer in violation of Section 2800.1 and the pursued vehicle is driven in a willful

"committed by one who, 'while fleeing or attempting to elude a pursuing peace officer,' drives his pursued vehicle in a 'willful or wanton disregard for the safety of persons or property.'" (*People v. Sewell* (2000) 80 Cal.App.4th 690, 695.)

Appellant contends that the evidence was insufficient to support the "willful and wanton disregard" element of the attempted evasion of a peace officer charge. He argues that a late-night, slow speed chase, on residential streets with sparse traffic and no "near misses" cannot establish the requisite disregard for safety, and that the Vehicle Code violations were mere "technical violations" and "were not committed in a dangerous manner, let alone a wanton manner." The fallacy in appellant's argument is that it focuses on the evidence that supports his innocence, while our task in reviewing for sufficiency of the evidence is to focus on the evidence that supports the jury's guilty verdict.

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or wanton disregard for the safety of persons or property, the person driving the vehicle, upon conviction, shall be punished by imprisonment in the state prison, or by confinement in the county jail for not less than six months nor more than one year. The court may also impose a fine of not less than one thousand dollars ($1,000) nor more than ten thousand dollars ($10,000), or may impose both that imprisonment or confinement and fine. [¶] (b) For purposes of this section, a willful or wanton disregard for the safety of persons or property includes, but is not limited to, driving while fleeing or attempting to elude a pursuing peace officer during which time either three or more violations that are assigned a traffic violation point count under Section 12810 occur, or damage to property occurs."

Section 2800.1 provides in part: "(a) Any person who, while operating a motor vehicle and with the intent to evade, willfully flees or otherwise attempts to elude a pursuing peace officer's motor vehicle, is guilty of a misdemeanor if all of the following conditions exist: [¶] (1) The peace officer's motor vehicle is exhibiting at least one lighted red lamp visible from the front and the person either sees or reasonably should have seen the lamp. [¶] (2) The peace officer's motor vehicle is sounding a siren as may be reasonably necessary. [¶] (3) The peace officer's motor vehicle is distinctively marked. [¶] (4) The peace officer's motor vehicle is operated by a peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code, and that peace officer is wearing a distinctive uniform."

"In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) We resolve all conflicts in the evidence and questions of credibility in favor of the verdict, and indulge every reasonable inference the jury could draw from the evidence. (*People v. Autry, supra,* 37 Cal.App.4th at p. 358.) Reversal on this ground is unwarranted unless '"upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]."' (*People v. Bolin, supra,* at p. 331.)

There was sufficient evidence here from which a jury could conclude that appellant acted with willful or wanton disregard for safety. He was driving in the dark without his headlights, made lane changes without signaling, continued straight from a left turn only lane, twice failed to stop at a stop sign and ran through a "stale red light" at 30 to 35 miles per hour. At times, he exceeded the speed limit on residential streets by up to 10 miles per hour. While these violations may not have been individually egregious, we are not prepared to conclude as a matter of law that the combination of such violations in one 40-minute pursuit was insufficient to constitute willful or wanton disregard for safety.

II. Section 2800.2 does not create an unconstitutional mandatory presumption.

A. The statute and jury instruction.

As previously noted, section 2800.2, subdivision (a), proscribes fleeing from a peace officer by driving with willful or wanton disregard for safety. Subdivision (b) of section 2800.2 provides that the "willful or wanton disregard" element of this offense "includes, but is not limited to" committing during the pursuit "either three or more violations that are assigned a traffic violation point count under section 12810 . . . , or damage to property . . . ."

The trial court instructed the jury in accordance with CALJIC No. 12.85 which contains substantially similar language to, and accurately reflects, sections 2800.1 and 2800.2, specifically advising the jury that willful or wanton disregard for the safety of

persons or property includes, but is not limited to, violating three or more specified Vehicle Code sections while driving during the pursuit.[4]

B. Appellant's contention.

Appellant contends that section 2800.2 creates an unconstitutional mandatory presumption. He argues that instructing the jury that a "willful or wanton disregard for the safety of persons or property" includes three or more specified Vehicle Code

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[4] CALJIC No. 12.85 as given to the jury provided in pertinent part:

"Defendant is accused in Count 1 of having violated section 2800.2, subdivision (a) of the Vehicle Code, a crime. [¶] A person is guilty of a violation of Vehicle Code section 2800.1, subdivision (a), a misdemeanor, if the person, while operating a motor vehicle and with the specific intent to evade, willfully flees or otherwise attempts to elude a pursuing peace officer, and [¶] 1. The peace officer's motor vehicle is exhibiting at least one lighted red lamp visible from the front, and the person either sees or reasonably should have seen the lamp, [¶] 2. The peace officer's motor vehicle is sounding a siren as may be reasonably necessary, [¶] 3. The peace officer's motor vehicle is distinctively marked, and [¶] 4. The peace officer's motor vehicle is operated by a peace officer wearing a distinctive uniform. [¶] Every person who flees or attempts to elude a pursuing peace officer in violation of Vehicle Code section 2800.1, subdivision (a) and drives the pursued vehicle in a willful or wanton disregard for the safety of persons or property is guilty of a violation of Vehicle Code section 2800.2, subdivision (a), a felony. [¶] 'Willful or wanton' means an act or acts intentionally performed with a conscious disregard for the safety of persons or property. It does not necessarily include an intent to injure. [¶] A willful or wanton disregard for the safety of persons or property also includes, but is not limited to, driving while fleeing or attempting to elude a pursuing peace officer during which time the person driving violates three or more Vehicle Code sections, such as 22100(b), 21453(a), 22107, 24250, or 22450(a). [¶] In order to prove a violation of Vehicle Code section 2800.2, subdivision (a), each of the following elements must be proved: [¶] 1. A person, while operating a motor vehicle, willfully fled or otherwise attempted to elude a pursuing peace officer; [¶] 2. The person did so with the specific intent to evade the pursuing peace officer; [¶] 3. The peace officer's vehicle exhibited at least one lighted red lamp visible from the front; [¶] 4. The person saw or reasonably should have seen the red lamp; [¶] 5. The peace officer's vehicle sounded a siren, as reasonably necessary; [¶] 6. The peace officer's motor vehicle was distinctively marked; [¶] 7. The peace officer's motor vehicle was operated by a peace officer wearing a distinctive uniform; and [¶] 8. The driver of the pursued vehicle drove the vehicle in a willful or wanton disregard for the safety of persons or property." (Italics added.)

violations required it to find the "willful or wanton disregard" element of the offense if it found the required violations, without consideration of other evidence. This, he argues, violates due process by diluting the prosecution's burden of proving each element of the offense beyond a reasonable doubt. This contention is without merit.

C. The constitutional evil of mandatory presumptions.

"Inferences and presumptions are a staple of our adversary system of factfinding." (*Ulster County Court v. Allen* (1979) 442 U.S. 140, 156.) A presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action. (Evid. Code, § 600, subd. (a).) It "permits or requires an ultimate fact to be found based upon the existence or nonexistence of certain predicate facts." (*People v. Frye* (1992) 7 Cal.App.4th 1148, 1155.) Presumptions, unlike permissible inferences, are deductions that the law directs (*Perry v. A. Paladini, Inc.* (1928) 89 Cal.App. 275, 285) and are either conclusive (also referred to as mandatory) or rebuttable. (Evid. Code, § 601.)

The due process clause "protects the accused against conviction except upon proof beyond a reasonable doubt *of every fact* necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358, 364, italics added.) A presumption that reduces that burden or places any burden on the defendant violates due process. The United States Supreme Court has considered the impact of presumptions on the prosecution's burden, stating: "[T]he ultimate test of any device's constitutional validity in a given case remains constant: the device must not undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt." (*Ulster County Court v. Allen, supra,* 442 U.S. at p. 156.) A mandatory presumption "tells the trier that he or they *must* find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts. [Citations.] In this situation, the Court has generally examined the presumption on its face to determine the extent to which the basic and elemental facts coincide. [Citations.] To the extent that the trier of fact is forced to abide by the presumption, and may not reject it based on an

independent evaluation of the particular facts presented by the State, the analysis of the presumption's constitutional validity is logically divorced from those facts and based on the presumption's accuracy in the run of cases. It is for this reason that the Court has held it irrelevant in analyzing a mandatory presumption, but not in analyzing a purely permissive one, that there is ample evidence in the record other than the presumption to support a conviction. [Citations.]" (*Id.* at pp. 157-160.)

D. Section 2800.2 does not create an unconstitutional mandatory presumption.

Contrary to appellant's contentions, section 2800.2 does not create a mandatory presumption of "willful or wanton disregard for the safety of persons or property," nor does it reduce or eliminate the prosecutor's burden of proof. Instead, the statute simply defines with precision one type of conduct that constitutes "willful or wanton disregard for safety." "'The statute does not presume, it defines. [Citations.]'" (*Burg v. Municipal Court* (1983) 35 Cal.3d 257, 265.) It provides that violating three specified Vehicle Code sections *is* "willful or wanton disregard for safety." The People must still prove the violations beyond a reasonable doubt.

III. The trial court was not required to instruct the jury sua sponte on the mistake-of-fact defense.

Appellant's defense was based upon his suffering from psychotic delusions and paranoia, which he claims was the reason he failed to stop for the police. Dr. Edelman testified that during the pursuit, appellant was suffering from psychotic hallucinations. Appellant knew he was being pursued by the police, but lacking the ability to interpret why, believed they were going to shoot him.

The trial court instructed the jury in accordance with CALJIC No. 3.32 that it could consider the evidence of appellant's mental disease "solely for the purpose of determining whether the defendant actually formed the required specific intent, which is an element of the crime charged. . . ." It failed, however, to give CALJIC No. 4.35, pertaining to the defense of mistake of fact, which states: "An act committed or an omission made in ignorance or by reason of a mistake of fact which disproves any criminal intent is not a crime. [¶] Thus a person is not guilty of a crime if [he] [she]

commits an act or omits to act under an actual [and reasonable] belief in the existence of certain facts and circumstances which, if true, would make the act or omission lawful." (Brackets in original.) The use note for this instruction provides, "In specific intent or mental state crimes, delete the bracketed phrase 'and reasonable'. Mistakes of fact, however, must be reasonable to negate general criminal intent."

Appellant contends that the trial court committed reversible error by failing to instruct in accordance with CALJIC No. 4.35 sua sponte. He argues that a mistake of fact is a defense to criminal conduct when it negates criminal intent, even where the mistake is unreasonable. He claims that the trial court's failure to instruct on this defense deprived him of his right to have a jury determine every material issue presented by the evidence. This contention is without merit.

In criminal cases, """"even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case."""" (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) "The duty to instruct, sua sponte, on general principles closely and openly connected with the facts before the court also encompasses an obligation to instruct on defenses . . ." (*People v. Lopez* (1992) 11 Cal.App.4th 1115, 1120) that are "supported by substantial evidence [and] that are not inconsistent with the defendant's theory of the case" (*People v. Montoya* (1994) 7 Cal.4th 1027, 1047; *People v. Breverman, supra,* 19 Cal.4th at p. 157). Even an accurate instruction may be properly refused if there is no evidence to which it properly relates. (See *People v. Ortiz* (1923) 63 Cal.App. 662, 667.)

Penal Code section 26 provides in relevant part, "All persons are capable of committing crimes except those belonging to the following classes: [¶] . . . [¶] Three -- Persons who committed the act or made the omission charged under an ignorance or mistake of fact, which disproves any criminal intent." Although that code section does not expressly require that the mistake of fact be reasonable, many cases have so indicated. (*People v. Reed* (1996) 53 Cal.App.4th 389, 396 ["'people do not act

unlawfully if they commit acts based on a *reasonable and honest* belief that certain facts and circumstances exist which, if true, would render the act lawful. [Citations.]" (Italics in original omitted, italics added.)]; see also *People v. Rivera* (1984) 157 Cal.App.3d 736, 742; *People v. Raszler* (1985) 169 Cal.App.3d 1160, 1165; *People v. Castillo* (1987) 193 Cal.App.3d 119, 124 [reasonableness is assessed by objective standard].) Although a few cases have adopted an "imperfect mistake-of-fact" defense, that is, a defense where the mistake of fact is unreasonable (see *People v. Navarro* (1979) 99 Cal.App.3d Supp. 1; *People v. Scott* (1983) 146 Cal.App.3d 823 (*Scott*)[5]), we have found no case applying that defense where the mistake was the result of mental disorder. To do so "would effectively, and impermissively, abrogate the defense of insanity." (*People v. Raszler, supra,* 169 Cal.App.3d at p. 1165, fn. 2.) Moreover, numerous cases have been reluctant to apply even a reasonable mistake-of-fact defense to mistakes resulting from mental disorder. (*People v. Castillo, supra,* 193 Cal.App.3d at p. 124; *People v. Gutierrez* (1986) 180 Cal.App.3d 1076, 1083; *People v. Geddes* (1991) 1 Cal.App.4th 448, 456.) Mental disease has never been an attribute of a reasonable man. (*People v. Castillo, supra,* at p. 124.) To consider mental disease as the circumstance in which to consider the reasonableness of the mistake of fact, requires an assessment of how a reasonable madman, an oxymoron, would behave. We conclude that neither a mistake-of-fact defense nor an imperfect mistake-of-fact defense should be applied where the mistake is the result of mental disorder, and, thus, the trial court did not err in failing to give this instruction sua sponte.

Appellant relies heavily on *Scott, supra,* 146 Cal.App.3d 823 which applied the mistake-of-fact defense to hallucinations caused by involuntary intoxication. In *Scott*, the

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5 *Scott* failed to acknowledge that, in effect, it was approving an unreasonable mistake-of-fact defense, but rather stated: "Although defendant's mistake of fact was undoubtedly irrational, it was also undoubtedly reasonable under the circumstances, because the circumstances include that the mistake emanated from a delusion caused by defendant's involuntary intoxication . . . ." (*Scott*, *supra*, 146 Cal.App.3d at p. 832.) *Scott* did not deal with the intractable problem of how to determine whether an irrational person is acting reasonably for an irrational person, a logical quagmire.

defendant became involuntarily intoxicated and began experiencing delusions after drinking drugged punch at a party. Believing he was a Central Intelligence Agency agent protecting the President from assassins, Scott attempted to commandeer several vehicles. Relying on Penal Code section 26, class Three, the Court of Appeal concluded that Scott was operating under a reasonable mistake of fact because the mistake was induced by the involuntary consumption of a drug. It stated: "If in fact defendant were a government agent and either his life or the life of the President were in danger and defendant attempted to commandeer the vehicles for the purpose of saving his own life or that of the President, his actions would have been legally justified under the doctrine of necessity." (*Scott, supra,* at p. 831.)

Scott has been restricted to the unique facts presented. (*People v. Raszler, supra,* 169 Cal.App.3d at p. 1165, fn. 2 [while accepting "[f]or present purposes . . . as correct the manner in which the *Scott* court projected the foregoing principle onto the factual situation presented there," added in a footnote: "Our tentative acceptance of *Scott* should not be misconstrued as our imprimatur of the universal application of that decision. As the trial court perceptively noted, *Scott* involved outlandish circumstances where 'defendant unknowingly and therefore involuntarily ingested some kind of hallucinogen which caused him to act in a bizarre and irrational manner . . . .' [Citation.] The involuntary ingestion of drugs is the linchpin to the doctrine of unreasonable mistake articulated in *Scott.* Without that indispensable ingredient, the unrestricted application of the unreasonable mistake of fact doctrine would effectively, and impermissively, abrogate the defense of insanity."]; *People v. Gutierrez*, *supra*, 180 Cal.App.3d 1076, 1083 ["Our discussion in *Scott* was carefully limited to the facts presented. *Scott* expressly stated that the mistake-of-fact defense would not have been available if the delusions had been caused by voluntary intoxication." The Court of Appeal in *People v. Gutierrez* noted that *Scott* did not discuss the relationship between mental illness and the mistake-of-fact doctrine and concluded that "there are sound policy reasons for refusing to permit a mistake-of-fact defense based on delusions which are products of mental illness."]; see also *People v. Geddes*, *supra*, 1 Cal.App.4th 448, 456 ["like the courts in

Raszler and particularly *Gutierrez,* we question whether a mistake-of-fact defense is appropriately utilized where defendant's delusions are the product of mental illness and/or voluntary intoxication"].)

We further conclude that the mistake-of-fact instruction was not required because the mistake of fact under which appellant was operating, that the police were going to shoot him, did not negate the specific intent to evade required by section 2800.2, but established it. Since a mistake-of-fact instruction would not negate the required specific intent, the trial court did not err in failing to give that instruction.

IV. Appellant may be punished for both attempting to evade a peace officer and resisting a peace officer.

The trial court sentenced appellant to the midterm of two years for attempting to evade a peace officer and one year for resisting a peace officer, to be served concurrently. Appellant contends that Penal Code section 654 bars punishment for both offenses and that the resisting a peace officer conviction should have been stayed. He presents a two-tiered argument. First, he argues that because the information alleged that appellant resisted Officer Crump, the jury could only convict him of resisting her. It could not convict him of resisting Officer Walczak, as respondent argued at trial. Therefore, he claims, the Penal Code section 654 analysis must be applied to the charges of evading Officer Crump and resisting Officer Crump. Second, he argues that Penal Code section 654 prohibits multiple punishment for an indivisible course of conduct even though it violates more than one statute, and when applied to appellant evading and resisting Officer Crump, both charges consisted of one course of conduct and a single objective -- fleeing in appellant's truck to escape. These contentions lack merit.

We first dispose of appellant's contention that the jury could not convict him of resisting Officer Walczak because that was not alleged in the information. The information has the limited role of informing a defendant of the kinds and number of offenses. "'[T]he time, place, and circumstances of charged offenses are left to the preliminary hearing transcript,' which represents 'the touchstone of due process notice to a defendant.'" (*People v. Jones* (1990) 51 Cal.3d 294, 312; see also *People v. Price*

(1991) 1 Cal.4th 324, 398 ["[t]he preliminary hearing evidence gave defendant ample notice of the charge against which he was required to defend" where the information was ambiguous].)

At appellant's preliminary hearing, only Officer Walczak testified. He described in detail how appellant failed to obey his orders at the Denny's restaurant parking lot. Defense counsel extensively cross-examined Officer Walczak regarding appellant's conduct in the parking lot in response to Officer Walczak's efforts to take him into custody, establishing that appellant did not fight or struggle when removed from the vehicle. In closing argument, defense counsel argued: "And specifically, with respect to count 2 [resisting a peace officer], we don't have any resisting arrest in the traditional sense. This charge, as filed, is when the officers tried to arrest someone, and there's a physical struggle and either a physical assault on the officer or an attempt to run away and flee. [¶] The officer testified that this was totally done by surprise, and that my client did not struggle or fight at all, even though I'm sure he was startled and surprised." It is clear from the preliminary hearing testimony and argument that appellant understood that the resisting a peace officer count pertained to the efforts of Officer Walczak to take appellant into custody in the Denny's restaurant parking lot. Thus, appellant was given adequate notice of the factual basis for the charge and could properly be convicted of resisting the orders of Officer Walczak.

Penal Code section 654 provides in pertinent part: "(a) An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." A course of conduct that constitutes an indivisible transaction that violates more than a single statute cannot be subjected to multiple punishment. (*People v. Butler* (1996) 43 Cal.App.4th 1224, 1248.) If a course of criminal conduct is found to be divisible into separate acts, they are treated as more than one act under section 654 and may result in separate punishment. (*People v. Bradley* (1993) 15 Cal.App.4th 1144, 1157, disapproved on other grounds in *People v. Rayford* (1994) 9 Cal.4th 1, 12.) Whether a course of conduct is

divisible depends on the intent and objectives of the actor. (*People v. Carter* (1995) 41 Cal.App.4th 683, 689, disapproved on other grounds in *People v. Deloza* (1998) 18 Cal.4th 585, 600, fn. 10.) If all of the offenses were incident to one objective, the conduct is divisible. (*Ibid.*)

Here, the charge of resisting a peace officer was not based on appellant's vehicular flight from Officer Crump, but of resisting the orders of Officer Walczak by appellant's conduct in the Denny's restaurant parking lot. Appellant failed for five or more minutes to respond to Officer Walczak's order to shut the engine of the truck. He also failed to place his hands outside the window as ordered. Instead, he rolled up the windows and lay down on the seat for five to 10 minutes, requiring Officer Walczak and three other officers to forcibly remove him, delaying and obstructing the discharge of their duty. While he did not fight the officers or become violent, such conduct is not necessary to constitute resisting a peace officer under Penal Code section 148, subdivision (a)(1). (*In re Bacon* (1966) 240 Cal.App.2d 34, 52, disapproved on other grounds in *In re Brown* (1973) 9 Cal.3d 612, 624.) It is only required that the defendant hinder or impede or in any manner disrupt or prevent the peace officer from performing his or her duties. (*Ibid.*) This conduct occurred after the vehicular pursuit ended, when appellant apparently realized flight was futile and abandoned his intention to flee. The resisting or obstructing a peace officer charge based on appellant's conduct in response to Officer Walczak is not based on the same conduct as the attempted vehicular evasion of Officer Crump's charge and is not subject to the prohibition in Penal Code section 654.

V. The abstract of judgment need not be amended.

The trial court sentenced appellant to the midterm of two years on the felony charge of attempting to evade a peace officer while driving recklessly, and to a concurrent one-year term on the misdemeanor charge of resisting a peace officer. The abstract of judgment contains no mention of the misdemeanor conviction and sentence. Respondent requests us to amend the abstract of judgment to reflect the misdemeanor conviction and sentence imposed. We decline to do so.

Respondent cites us to no authority that misdemeanor convictions must be included in the abstract of judgment, and the form promulgated by the Judicial Council pursuant to Penal Code section 1213.5 does not require that information. (See also Pen. Code, § 1213.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

_____, P.J.
BOREN

We concur:

_____, J.
NOTT

_____, J.
DOI TODD